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SCOTUS WILL SOON DECIDE WHETHER CLASS WAIVERS ARE ENFORCEABLE

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The Supreme Court of the United States will soon decide whether companies may use class waivers in employment contracts to prohibit workers from joining together in legal proceedings regarding workplace issues. Recently, there has been disagreement among the circuit courts as to whether the National Labor Relations Act ("NLRA")[1] prohibits class waivers, which protect workers' rights to engage in concerted activities. While the Seventh and Ninth Circuits answered this question in the affirmative,[2] the Fifth Circuit held that employers may use class waivers in employment contracts.[3]

Later this year, the Supreme Court will resolve this issue when it hears *Epic Systems Corp. v. Lewis*. In this case, Epic has an arbitration agreement which requires that employees waive their right to join as a class, and to resolve all workplace-related disputes through individual arbitration. A former employee filed suit against Epic in federal court, individually and on behalf of other similarly situated employees, for overtime wages.[4] Epic, citing the waiver clause in its employment agreements, moved to dismiss the suit.[5] The district court denied Epic's motion to dismiss, holding that the waiver violated the right of the employees to engage in "concerted activities",[6] thus making the clause unenforceable. The Seventh Circuit affirmed the lower court's decision, in addition to holding that the waiver was unenforceable under the Federal Arbitration Act.[7]

The *Lewis* case has been consolidated with two cases: 1) *Ernst Young v. Morris*; and (2) *National Labor Relations Board v. Murphy*

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[1] National Labor Relations Act, 29 U.S.C.A §§ 151-169

[2] *See* Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016) (add cert granted); *See also* Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

[3] Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013 (5th Cir. 2015).

[4] *Lewis*, 823 F.3d at 1151.

[5] Lewis v. Epic Systems Corp., No. 15-cv-82-bbc, 2015 WL 5330300, at *1 (W.D.Wis. Sept. 11, 2015).

[6] *Lewis*, 823 F.3d at 1151; 29 U.S.C. § 157 ("Employees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

[7] Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

Oil USA Inc. In *Morris*, employees of Ernst Young were required to sign agreements barring them from joining other employees to bring legal claims.[8] The Ninth Circuit held that an employer may not condition employment on the requirement that an employee sign a contract that "forecloses the possibility of concerted work-related claims."[9] In *Murphy*, Murphy Oil required employees to agree to resolve all employment-related claims through individual arbitration.[10] Here, the Fifth Circuit held that Murphy Oil committed no unfair labor practice when it required employees to relinquish their right to pursue class collective claims.[11]

One of the major problems when it comes to class waivers, is that many of the companies that require these provisions have employees across many states. Because this issue lacks uniformity, these arbitration provisions may or may not be enforced depending on where the action is brought. As stated in Epic's Petition for Writ of Certiorari, "Employers need to know whether class waivers in arbitration provisions will actually be enforced" and "[e]mployees need to know whether they are actually bound by [class waiver] provisions."[12] Resolving this issue will have an immediate and significant impact on companies and employees throughout the United States, many of which require and are bound by class waiver clauses.

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[8] *Morris*, 834 F.3d at 979.

[9] *Id.* at 989.

[10] *Murphy*, 808 F.3d at 1015.

[11] *Id.* at 1018.

[12] Petition For A Writ Of Certiorari, Epic Systems Corp. v. Lewis, ___ U.S. ___ (2017) (No. 16-285), 2016 WL 4611259, at *24.